In order to found the jurisdiction of the District Court to try an offence of armed robbery there must be, by virtue of the provisions of section 8 —

(i) an application by the Public Prosecutor to the District Court to try such offence;

(ii) the appellant must consent to be tried by such Court.

There was here no application by the Public Prosecutor before the Court to try the offence. All that appears to have happened was that after the main witness for the prosecution, the complainant, and his sister had given their evidence the prosecutor informed the Court that the appellant had not consented to be tried by the District Court. The Court thereupon inquired of the appellant who stated that he wished to be tried by that Court and his counsel intimated that he did not wish the two prosecution witnesses to be recalled and the trial proceeded.

This, in my view, falls far short of and is quite inadequate to meet the requirements of section 8. In any event the prosecuting officer, an Inspector of Police, was not the Public Prosecutor for this purpose. The matter is governed by section 391 of the Criminal Procedure Code.

As the essential prerequisites provided for by section 8 have not been fulfilled the District Court, in my opinion, had no jurisdiction to try the appellant on this charge of armed robbery.

The effect of section 10(1) of the Criminal Procedure Code, in so far as it concerns this appeal, is that the offence of armed robbery under section 397 of the Penal Code may only be tried by the High Court notwithstanding the other provisions of the Code.

For these reasons therefore the trial was, in my view, a nullity and the appeal must be allowed and the conviction and sentence quashed.

As the appellant has already served six months of his sentence and in view of the unusual circumstances surrounding this case, I do not propose to remit the proceedings back to a Magistrate's Court for a Preliminary Inquiry.

Order accordingly.

Solicitors: *Marshall & Chung.*

GOVERNMENT OF THE FEDERATION OF MALAYA v. FRANCIS KORAN

[O.C.J. (Neal J.) April 27, 1961]

[Ipoh — Originating Motion No. 19 of 1960]

Workmen's Compensation Ordinance, 1952, ss.30(2) and 43 — Workmen's Compensation Regulations, 1953, reg. 32 — Whether intra vires or ultra vires.

Legislation — Regulation in conflict with statute — Court's jurisdiction.

This was an appeal from an award of the arbitrator under the Workmen's Compensation Ordinance, 1952 that failure to deny the claim constituted an admission under reg. 32. The two main grounds of appeal were firstly whether or not reg. 32 of the Ordinance was *intra vires* or *ultra vires* the rule making power contained in the Ordinance and secondly, whether if it was *intra vires*, it creates no more than a rebuttable presumption. It was argued on behalf of the workman that the regulation having been tabled before Parliament (as it then existed) and there being no motion to annul, the Court could not go into the question of *vires*.

Held: (1) the effect that the Court will not interfere with statutes and certain statutory instruments is limited to the statutes themselves and to such subsidiary legislation or instruments as are by the enactment itself declared to form part of the legislation enacted. The legislature having by its language not claimed freedom from the controls of the Court, the Court has power to declare whether these regulations were *intra vires* or *ultra vires* the rule making power under section 32 of the Ordinance;

(2) regulation 32 is not only not within the general provisions of section 43 but it is in direct conflict with section 30(2); and that section 30(2) overrides reg. 32.

Cases referred to:—

(1) *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347.

(2) *Minister of Health* v. *The King (on the prosecution of Yaffe)* [1931] A.C. 494.

APPEAL FROM WORKMEN'S COMPENSATION ARBITRATION.

Syed Othman (Federal Counsel) for the applicant.

N. T. Rajah for the respondent.

Neal J. (delivering oral judgment): The Government of the Federation of Malaya appeals from an award of the arbitrator under the Workmen's Compensation Ordinance, 1952, when a ruling was given that the failure to deny the claim constituted an admission under regulation 32, and although it is not clear from the record judgment was entered against the Federation Government for the compensation claimed.

A number of grounds of appeal were put forward on behalf of the Government of the Federation: only two of those I find to be of any substance, namely, whether or not regulation 32 of the Workmen's Compensation Regulations, 1953 is *intra vires* or *ultra vires* the rule making power contained in the Workmen's Compensation Ordinance; and, secondly, whether even if the regulation be *intra vires* the powers of the rule making body that it creates no more than a rebuttable presumption, and the arbitrator was wrong in not so ruling and calling upon the Government to produce evidence in rebuttal, that is to say, the arbitrator was wrong in law in not giving an opportunity to the Government to produce evidence in rebuttal of the admission deemed to have been made. The first submission involves a decision on two points of law: firstly, and that has been so expressly raised on behalf of the workman, the regulation having been tabled before Parliament (as it then existed), and there being no motion to annul, whether there could be any enquiry in this Court as to whether or not regulation 32 in *intra vires* or *ultra vires*. The second question is, is regulation 32 *intra*

vires or *ultra vires* the rule making power contained under the section of the Workmen's Compensation Ordinance, 1952.

For the workman reliance was placed upon two authorities both of them before the decision of the House of Lords in *Institute of Patent Agents* v. *Lockwood.* [1] It is not clear from the report of the latter one of them but it is clear from the report of the earlier case on which the second case was decided that there was express provision in the ordinance or in the legislation in that case that the rules if not objected to after tabling shall have effect as if enacted in the enactment. In view of the subsequent decision in *Lockwood's* case and the further decision of the House of Lords in *Minister of Health* v. *The King (on the prosecution of Yaffe),* [2] I find it unnecessary to deal in detail with those two authorities. In *Lockwood's* case the House of Lords were dealing as it is clear from Lord Dunedin's judgment in *Yaffe's* case with rules made under the rule making authority which provided for the tabling in Parliament and their becoming, if not objected to, part of the enactment. Such is not the case before me. Section 43(3) contains no such provision that the rules if not objected to shall form part of the Ordinance. The correctness of the decision in *Lockwood's* case has been challenged by the subsequent decision of the House of Lords in *Yaffe's* case. For myself, I am of the opinion that the authorities to the effect that this Court will not interfere with statutes and certain statutory instruments is limited to the statutes themselves and to such subsidiary legislation or instruments as are by the enactment itself declared to form part of the legislation enacted. I am not prepared nor do I know of any authorities to justify my extending the operation of those authorities to a case such as the present. As I appreciate the reasoning behind the authorities it is that this Court will exercise a jurisdiction to protect the public but will not exercise that jurisdiction where it has already been or could have been the subject of investigation or enquiry in the legislature. In this case I see no reason for denying myself jurisdiction or denying this Court jurisdiction. The legislature itself has not seen fit by the use of the usual language to claim freedom from the controls of this Court for these particular regulations. For these reasons, in my opinion, I have power to declare whether these regulations are *intra vires* or *ultra vires* the rule making power under section 32 of the Ordinance. It is submitted regulation 32 is *intra vires* the general power which reads: "For carrying out the purposes of this Ordinance," and (h) which reads: "prescribe the procedure to be followed in investigations or enquiries under section 27." In my dealing with this specific power relied upon by the workman in the first instance I would draw a distinction between matters of procedure and matters of proof, this distinction has been drawn on a number of occasions before. As to whether it is within a general power for carrying out the purposes of this Ordinance one has to consider the actual provisions of the Ordinance and they may be briefly summarised. After an accident has happened notice has to be given by the workman within a limited time unless exempted by the Ordinance. The main exemptions are fatal accidents and where employer already has notice. He then makes his claim. It is then open to the employer if he wishes to enter into an agreement, and if there is an expression of willingness to enter upon it then the Commissioner must hold an enquiry and the agreement which must be by way of memorandum is duly recorded under section 28. Then follows section 29: "If the employer has not within the 14 days provided by section 28 forwarded the agreement then even though the workman has agreed to accept a sum of money the employer becomes liable for the full amount." Under section 30 the arbitrator is given a jurisdiction limited to cases where a question arises under the Ordinance and cannot be settled. Sub-section (2) provides in terms that a question is not settled by agreement unless the workman, the employer and the Commissioner all signify their consent by signing an acknowledgment of agreement or unless an agreement between the worker and the employer is recorded by the Commissioner under the provisions of section 28.

Reading the sections of the Ordinance forces me to the conclusion that not only is rule 32 not within the general provisions in section 43 but it also is in direct conflict at least with sub-section (2) of section 30 to which I have made reference, if not with the whole principle of the legislation. If I am wrong in my interpretation of the limits of the judgment in *Lockwood's* case and the other authorities I would rely as did Lord Dunedin in *Yaffe's* case on the dicta of Lord Hershell that even if this Court is precluded from deciding the question of *ultra vires* in the case of a conflict between the law as set out in a statute and that set out in the regulations then this Court has the power to state which is the overriding provision to which effect should be given at the expense of the other provision.

What I have said earlier is clear that I hold that there is a direct conflict between section 30(2) and regulation 32. That being so following the expression of opinion of Lord Hershell in *Lockwood's* case and Lord Dunedin in *Yaffe's* case I hold that section 30(2) overrides regulation 32.

Coming now to the second point on which I think it is necessary that I express an opinion if the case is to be taken further, namely, even if it had been *intra vires* does regulation 32 do more than create a rebuttable presumption? I think one is correct when one says that the statute law abounds with presumptions that on proof of certain things the party shall be deemed to have committed certain offences. Those provisions have come before the Courts in the United Kingdom and in this country on many occasions. On each and every occasion it was held that they do no more than create a rebuttable presumption. I can see no reason nor has any reason been given to me for holding that there is a distinction between regulation 32 and the other provisions which have been referred to. I am of the opinion therefore regulation 32 even if *intra vires* creates no more than a rebuttable presumption, and the arbitrator was wrong in not calling on and permitting the Government to produce evidence in rebuttal. That he did not do so is clear from the record.

This matter comes before me under the equivalent procedure of section 34 of the Courts Ordinance and the appropriate order therefore is that the order of the arbitrator is set aside and a re-trial is ordered. There will be no order as to costs.

Re-trial ordered.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

THE SINGAPORE HARBOUR BOARD v. AUSTASIA LINE LTD.

[O.C.J. (Tan Ah Tah J.) January 25, 1961]

[Singapore — Suit No. 663 of 1959]

Negligence — Ship repairers — Damage to ship — Use of fire — Fire precautions — Special dangers — Res ipsa loquitur.

Contract — Ship repairers — Claim for work done and materials provided — Claim for services rendered and fire-fighting craft and appliances provided — Fire caused by plaintiff's negligence.

In this case the plaintiffs claimed $790,533 for work done and materials provided by them at the defendants' request for the purposes of repairing the defendants' vessel *Mandama*, and $88,760.11 for services rendered and fire-fighting craft, etc. provided during a fire on the vessel. The defendants admitted these claims but alleged that a reasonable charge for the services and supply of fire-fighting craft so provided would be $8,571.40. The defendants further relied on the doctrine of *res ipsa loquitur* and alleged that the plaintiffs were negligent in carrying out the work and alternatively that the plaintiffs who were responsible for fire-fighting precautions were in breach of their duty (as a result of which the vessel caught fire). The defendants thus claimed to set off the damages suffered by them by reason of the plaintiffs' negligence against the plaintiffs' claim. Alternatively the defendants counterclaimed against the plaintiffs the damages suffered by them.

Held: (1) the plaintiffs were under a duty to take precautions against damage being caused to the ship by the fire. The plaintiffs failed to take precautions which were not only commercially practicable but were in the circumstances ordinary and usual. They thus were guilty of negligence;

(2) the doctrine of *res ipsa loquitur* applied in this case and the burden was on the plaintiffs to show either that in fact that they were not negligent or that the outbreak of the fire might more probably have happened in a manner which did not connote negligence on their part.

Cases referred to:—

(1) *Ellerman Lines Ltd.* v. *H. & C. Grayson Ltd.*, [1919] 2 K.B. 514.

(2) *H. & C. Grayson Ltd.* v. *Ellerman Line Ltd.* [1920] A.C. 466.

(3) *The Pass of Ballater* [1942] 58 T.L.R. 221.

CLAIM.

C. H. Smith for the plaintiffs.

J. E. Lloyd for the defendants.

Cur. Adv. Vult.

Tan Ah Tah J.: In this case the plaintiffs' claim is for $879,293.11 being as to $790,533.00 the amount alleged to be due from the defendants to the plaintiffs for work done and materials provided by the plaintiffs at the defendants' request for the purpose of effecting repairs to the defendants' vessel *Mandama* and as to $88,760.11 being the amount alleged to be due from and payable by the defendants for services rendered and fire-fighting craft and appliances provided by the plaintiffs during a fire on the *Mandama*.

By their defence the defendants admit that the plaintiffs did work and supplied materials for and to the use of the defendants of a value of $790,533 as claimed by the plaintiffs. The defendants further admit that the plaintiffs rendered services and provided fire-fighting craft and appliances during the fire on the *Mandama* but allege that a reasonable charge for the services and supply of fire-fighting craft and appliances would be the sum of $8,571.40. It is also alleged by the defendants that the plaintiffs by their workmen who were engaged in the repair of the *Mandama* on the 28th June, 1958 were so negligent in carrying out the work that they set fire to the vessel. Further and in the alternative it is alleged by the defendants that the plaintiffs were on the 28th June, 1958 responsible for the fire-fighting precautions on the *Mandama* and were so negligent in the performance of their duties that they permitted the vessel to catch fire. In making the allegations regarding the plaintiffs' negligence in carrying out the repairs and taking fire precautions the defendants expressly state that they are relying upon the doctrine of *res ipsa loquitur*. Following on these allegations the defendants claim to set-off the damages suffered by them by reason of the plaintiffs' negligence against the plaintiffs' claim. Alternatively the defendants counterclaim against the plaintiffs for the damages suffered by them.

On the 28th June, 1958 the *Mandama* was moored near the main wharf at Keppel Harbour. The repairs which were to be carried out on the vessel involved the cutting of the plating on the steel bulkhead which separated No. 1 hold from No. 2 hold. About three feet away from the steel bulkhead and situated in No. 2 hold was